

Supreme Court, U. S.

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IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM 1976

No.

76-1302

**JOHNNIE CRAIG, JR.,
Petitioner,**

v.

**UNITED STATES OF AMERICA,
Respondent.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Now comes Johnnie Craig, Jr., Petitioner herein, by and through his attorneys, Cornelius Pitts and Kenneth M. Mogill, and petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in this cause for the following reasons:

1. OPINIONS BELOW

The opinions of the Court of Appeals in this cause are not requested. [See appended copies.]

2. JURISDICTION

Petitioner's conviction was affirmed by Order of December 23, 1976. Rehearing was denied February 15, 1977. [When originally submitted, Petitioner's Petition for Rehearing in the Court of Appeals was considered untimely by that Court. Application for Extension of Time for Filing Petition for Writ of Certiorari was granted by Mr. Justice Stewart on January 20, 1977, extending the time for filing to and including February 21, 1977. Subsequently, the Court of Appeals agreed to consider Petitioner's Petition as timely. See appended copy of Order and letter of Kenneth M. Mogill.]

Jurisdiction to review the judgment in this cause is conferred on this Court by 28 USC §1254 (1).

3. QUESTION PRESENTED

The question presented for review is whether, where evidence is presented at trial indicating that government agents induced petitioner, who was not predisposed to sell narcotics, into engaging in a series of illegal drug transactions, the trial court is obliged upon request to charge the jury that if they find entrapment, they may find that any or all of the alleged illegal acts were not independent acts but were part of a course of conduct produced by government inducement.

4. STATUTORY PROVISIONS

This case involves the provisions of 21 USC §841, the text of which is appended hereto, and this Court's supervisory powers over the conduct of trials in federal courts.

5. STATEMENT OF THE CASE

Petitioner was charged herein in an eight-count Indictment in the United States District Court for the Eastern District of Michigan with having sold narcotics on four occasions to an undercover federal agent. He claimed that he was entrapped into the sales by the appeals to friendship and claims of dire financial straits by a long-time acquaintance who was, unbeknownst to petitioner, working with the undercover agent. The acquaintance was present for the first two transactions but was hospitalized for the last two. A stated need for money to pay for an operation was an aspect of her inducement of petitioner.

Petitioner requested the district judge to instruct the jury that

If you find that the Defendant was entrapped, that is, that the Government and or its agent(s), induced the Defendant to engage in certain criminal activity, then you may find that any and all of the alleged illegal acts were not independent acts but were part of a course of conduct which was the product of inducement by the Government. [Request to Charge No. 3]

This request was denied. Petitioner was found not guilty of the four counts involving the first two transactions but was convicted of the four counts involving the two transactions at which his friend was not present.

6. STATUTORY PROVISIONS INVOLVED

Jurisdiction in the district court was based upon the provisions of 21 USC §841.

7. REASONS FOR GRANTING THE WRIT

The writ should be granted in this cause because the issue raised herein is one of continuing importance to the trial of cases involving claims of entrapment, and an issue as to which the district courts and courts of appeal are in need of guidance from this Court as to the point of law involved. Cf. *Sherman v United States*, 356 US 369, 374, 78 SCt 819, 2 LEd2d 848, 852 (1958); *United States v Wells*, 506 F2d 924, 926 (5th Cir 1975); *United States v Watson*, 489 F2d 504, 507 (3d Cir 1973). See also *United States v Buie*, 407 F2d 905, 907 (2d Cir 1969), aff'd *sub nom. Minor v United States*, 396 US 87, 90 SCt 283, 24 LEd2d 283 (1969). The refusal of the district judge to give the requested instruction denied petitioner the opportunity to have the jury clearly instructed on the particular point of law most crucial to his defense. Because of the greater capacity of a claim of entrapment to confuse a jury, and because of the particular facts of this case, the district judge should have given the requested instruction. Given the verdict in the case, the failure so to instruct the jury cannot be said to be harmless error. *Chapman v California*, 386 US 18, 87 SCt 824, 17 LEd2d 705 (1967).

8. CONCLUSION

Wherefore, Defendant prays this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: March 11, 1977

APPENDIX A
ORDER OF THE COURT OF APPEALS
No. 76-2065

(United States Court of Appeals for the Sixth Circuit)

(Filed December 23, 1976)

United States of America, Plaintiff-Appellee, v.
 Johnnie Craig, Defendant-Appellant.

Before: McCree, Lively and Engel, Circuit Judges.

This case is before the court on direct appeal from a jury conviction for possession of heroin with intent to distribute in violation of 18 U.S.C. §841 (a) (1). The defendant was charged in eight separate counts and the jury found him guilty as charged in four counts and not guilty with respect to the remaining four counts. The district court instructed the jury on the defense of entrapment and charged that the jury should consider entrapment with respect to each count of the indictment. The appellant argues that he was entitled to a "course of conduct" instruction and that the district court erred in refusing to give such an instruction which he tendered. This court has examined the charge to the jury in its entirety and finds no error in the instructions as given. Neither was there error in the refusal of the court to give the tendered instruction under the evidence in this case.

The defendant also argues that the court erred in failing to give an additional instruction that his admitted involvement in marijuana did not establish predisposition to distribute narcotics. The jury was fully instructed on the necessity for the government to establish a predisposition to deal in narcotics and the district court did not err in declining to instruct the jury as requested on this issue.

The defendant argues as his third issue that government agents and a member of the staff of the United States Attorney's office engaged in his prosecution contacted him without notice to his attorney after indictment and after it was known that he had retained an attorney. This issue does not appear to have been presented to the district court for its decision. Our affirmance of the judgment is without prejudice to the right of the defendant to raise this issue in appropriate post-conviction proceedings.

The judgment of the district court is affirmed.

Entered by Order of the Court
 /s/ John P. Hehman
 Clerk

APPENDIX B
ORDER OF THE COURT OF APPEALS

No. 76-2065

(United States Court of Appeals for the Sixth Circuit)

(Filed February 15, 1977)

United States of America, Plaintiff-Appellee, v. Johnnie Craig, Defendant-Appellant,

Before: McCree, Lively and Engel, Circuit Judges.

No judge in regular active service having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the panel which heard the appeal.

Upon consideration of the petition for rehearing the court concludes that no issues are raised therein which were not considered by the court upon submission of this appeal.

The petition for rehearing is denied.

Entered by Order of the Court
 /s/ John P. Hehman
 Clerk

APPENDIX C
ORDER EXTENDING TIME TO FILE PETITION
(Supreme Court of the United States)
(Dated January 20, 1977)
No. A-580

Johnnie Craig, Jr., *Petitioner*, v. United States.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 21, 1977.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 20th day of January, 1977.

APPENDIX D
LETTER REGARDING TIME LIMITATIONS

February 9, 1977

Larry Gill
Assistant Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Johnnie Craig, Jr. v United States, #A-580*

Dear Mr. Gill:

Pursuant to our conversation of February 8, please be advised that subsequent to our filing of an application for extension of time in which to file a petition for a writ of

certiorari in the above-captioned cause, the Sixth Circuit determined that our petition for rehearing in that court was timely filed. Decision on the merits on rehearing is still pending. It is my understanding that our time for timely filing a petition for writ of certiorari in the Supreme Court will therefore begin to run from the date of the decision by the Sixth Circuit on rehearing rather than end on February 21.

Thanking you for your attention to this matter, I am,

Sincerely yours,
Kenneth M. Mogill

KMM/kc

cc: Solicitor General of United States, Philip Van Dam, United States Attorney, Eastern District of Michigan, Clerk, United States Court of Appeals for the Sixth Circuit (#76-2065)

bcc: Cornelius Pitts

APPENDIX E
TEXT OF 21 USC §841

§841. Prohibited acts A—Penalties

- (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally —
 - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
 - (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Except as otherwise provided in section 405 any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than \$50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than \$15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of

the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than \$30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than \$10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than \$20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than \$10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 404.

(c) A special parole term imposed under this section or section 405 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 shall be in addition to, and not in lieu of, any other parole provided for by law.